Supreme Court of the United States

October Term—1943

No. 1

R. Simpson & Co. Inc.,

Petitioner,

vs.

Commissioner of Internal Revenue.

PETITION BY THE PETITIONER HEREIN FOR REHEARING INCLUDING VACATION OF ORDER DISMISSING WRIT OF CERTIORARI HEREIN AND GRANTING OF ORDER REINSTATING SAID WRIT AND REOPENING THE APPEAL.

Gerald Donovan,
Counsel for Petitioner.

Francis F. Stevens,
Of Counsel.

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PETITION FOR REHEARING, INCLUDING VACATION OF ORDER AND GRANTING ORDER OF REINSTATEMENT AND REOPENING.

To the Honorable Harlan Fiske Stone, Chief Justice, and the Associate Justices, of the Supreme Court of the United States:

Comes now, R. Simpson & Co., Inc., the petitioner in the above-entitled cause, and presents, by its attorney, Gerald Donovan, its petition for rehearing (including vacation of the order dismissing the writ of certiorari herein, and granting of order reinstating said writ) and, in support thereof, respectfully shows to this Honorable Court:

1. That on or about September 25, 1942, your petitioner filed its petition, in the above-entitled cause for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, together with its brief in support of said petition and the transcript of record.

2. That the principal contentions presented by said petition for certiorari were as follows:

(a) That the United States Circuit Court for the Second Circuit erred in holding herein that during the taxable

years in controversy (1934, 1935 and 1936) the petitioner, a corporation found herein by the United States Board of Tax Appeals to have been "actively engaged in the conduct of business with the general public in the operation of its pawnshops" (R. 27), and not found by the Board to have held the securities of, or otherwise to have controlled, any other corporation, person or organization, was a holding company within the meaning of Section 351 of the Revenue Acts of 1934 and 1936, respectively, or either of said acts.

(b) That said Circuit Court erred in holding that the application to petitioner of the aforesaid two statutes, or either of them, is not unconstitutional under the organic law of the United States of America.

(c) That said Circuit Court erred in holding that said statutes, or either of them, as applied to petitioner are not unconstitutional under the organic law of the United States of America.

(d) That said Circuit Court erred in holding that the filing by petitioner of its "complete income and excess-profit tax returns, Form 1120, for the taxable years" (R. 27), the filing by petitioner of "information returns, Form 1096, with the attached Form 1099 listing the amounts of dividends over $300. paid to its stockholders, for the years in question" (R. 27) and the further fact that "petitioner's books and records, which gave some indication that more than 50 per cent of its stock was owned by less than five stockholders and disclosed that at least 80 per cent of its income was derived from interest, were at all times available to respondent and were actually made available to respondent's agents during audit of the income tax returns for the taxable years" (R. 27, 28), did not constitute in substance and effect the filing of Form 1120-H (personal holding company return) or the equivalent thereof, or did not,

at the very least, relieve petitioner from the imposition of penalties for failure to file said Form 1120-H.

3. That on or about November 9, 1942, this Honorable Court denied the aforesaid petition for a writ of certiorari.

4. That on or about February 10, 1943, a conflict of decisions on the same matter developed between United States circuit courts of appeals through the unanimous decision of the United States Circuit Court of Appeals for the Ninth Circuit in the case of *Lane-Wells Company* v. *Commissioner of Internal Revenue* (not yet officially reported) holding under substantially similar facts to those herein that (contrary to the decision of the Second Circuit, herein, as stated above) no penalties should be imposed for failure to file such Form 1120-H.

5. That on or about March 22, 1943, the opinion of the Ninth Circuit in said *Lane-Wells Co.* case was withdrawn and another opinion (denying the petition for rehearing of Commissioner of Internal Revenue) substituted therefor.

6. That the aforesaid substituted opinion of the Ninth Circuit did not modify, alter, or revoke said court's conclusion that penalties should not be imposed for failure to file Form 1120-H, but, on the contrary, unanimously reaffirmed, after painstaking reconsideration, said court's original, unanimous decision to that effect.

7. That the reason the petition for rehearing of the application for certiorari was not sooner presented to this Honorable Court is that the aforesaid conflicting decision of the Ninth Circuit had not been, at that time, officially reported and petitioner had just recently become informed of its existence.

8. That on June 7, 1943 a motion for rehearing was granted by this Honorable Court and the prior order deny-

ing certiorari vacated. Certiorari was limited, however, to the second question involved (see paragraph "3" immediately *supra*)—*i. e.* the asserted penalty liability of the petitioner for failure to file Form 1120-H (personal holding company return).

9. That on January 12, 1944 the cause was argued before this Honorable Court.

10. That on February 14, 1944 the Court dismissed the writ of certiorari herein for want of jurisdiction, promulgating at the same time its majority opinion in support thereof. That, at the same time a dissenting opinion, concurred in by three of the Justices of the Court, was promulgated.

11. That, it is respectfully submitted, said dismissal of the writ of certiorari herein was erroneous, as shown by errors of fact and of law apparent on the face of the aforesaid majority opinion herein.

12. That among the errors of fact apparent on the face of said opinion are the following:

(a) *Page 4*—"The Government after consideration of the practical aspects of the question advises that in its view our practice in these matters has been 'salutary and in accordance with sound policy'" in so far as that (incomplete) quotation is used to sustain the contention that the Department of Justice's brief supports denial of certiorari within the term but beyond the 25 day period presently provided for in Rule 33 of this Honorable Court.

(b) *Page 1*—"The Commissioner *assessed* personal holding company surtaxes * * * and assessed a 25 per cent penalty"—

Although it is true that the Government's brief states a situation where the Commissioner deemed assessment necessary prior to judicial hearing of the controversy, the Record (8-16, 28-30, 31) belies it (as was pointed out to this Honorable Court at pages 1-2 of our Reply Brief).

(c) *Page 1* — "The *treasurer* who executed the income tax returns". — Although it is true that the Government's brief states to the Court that the treasurer executed the income tax returns, the Record (28) belies this also (as was brought to the attention of this Honorable Court at page 1 of our Reply Brief) for it was not the chief financial and accounting officer of the corporation who filed the returns but the chief executive officer—the president.

13. That among the errors of *law* apparent on the face of said opinion are the following:

Page 4 — "But when under our *rules* ((meaning after 25 days)) our denial has become final, the *statute* deprives us of jurisdiction over the case"—This seems an inadvertence (although an important one) for, of course, the power of the Court over its orders extends throughout the Term regardless of the number of days specified by the current *rule* for receiving applications for rehearing *without permission*. The authority to grant petitions for rehearing *during the Term* rises from the same source.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition for a rehearing be granted at such time as may be convenient to be fixed by the Court and that

(a) the order herein dismissing the writ of certiorari herein be vacated;

(b) that an order be granted reinstating said writ and reopening the appeal;

(c) that that portion of the judgment herein of the United States Circuit Court of Appeals for the Second Circuit which imposes a tax penalty be reversed (or at the very least that the penalty for the taxable year 1936 be removed or the cause remanded to the Tax Court for the purpose of reconsidering the imposition of the 25 per cent penalty for the year 1936, if the petitioner shall seasonably apply to the Tax Court therefor); and

(d) for such other and further relief as the nature of the case may require and to this Honorable Court shall seem proper.

March 8, 1944.

Respectfully submitted,

(Sgd.) GERALD DONOVAN,
Counsel for Petitioner.

FRANCIS F. STEVENS,
Of Counsel.

CERTIFICATE OF COUNSEL.

I, counsel for the above-named R. SIMPSON & Co. INC., petitioner and movant, do hereby certify that the foregoing petition for rehearing is presented in good faith, not for delay, and in the judgment of counsel is well founded in law and fact.

(Sgd.) GERALD DONOVAN,
Counsel for R. Simpson & Co. Inc.
Petitioner and Movant.

Supreme Court of the United States

October Term—1943

No. 1

R. Simpson & Co. Inc.,

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vs.

Commissioner of Internal Revenue.

MEMORANDUM OF LAW.

As was set forth in the Petition for Rehearing *supra*, it is respectfully submitted that the dismissal of the writ of certiorari herein was erroneous, as shown by errors of fact and of law apparent on the face of the majority opinion in support of said dismissal.

Errors of Fact.

We shall not burden the Court by repeating here the full quotation of the errors of fact in the majority opinion but respectfully refer the Court to the Petition for Rehearing *supra*. Suffice it to say that the situation involved herein was not, as the Government brief states, of the type where the Commissioner made or attempted to make a jeopardy or other assessment prior to judicial hearing of the controversy (R. 8-16, 28-30, 31).

Furthermore the chief financial and *accounting* officer of the corporation did not, as the majority opinion states, execute the income tax returns; that was done by the chief executive officer—the president.

Also Department of Justice's brief herein does not, as the majority opinion herein states, advise that the practice of denying in tax cases, rehearing beyond the *25 day* period would be salutary and in accordance with sound policy but, on the contrary, maintains that the previous practice of this Court in reconsidering *within the term*, denials of certiorari "in Section 1140 cases, as well as in other cases, is salutary and in accordance with sound policy" (Govt. Brief 27). See also pages 7, 14, 15, 16, 17, 20, 21, 23, 24, 26. ("Section 1145 does mitigate any hazard to the revenues consequent upon the delay of a few *months*"; 27 (footnote) and 28.)

Errors of Law.

As pointed out in the Petition for Rehearing, *supra*, if, as the prevailing opinion concedes, the Court has jurisdiction to grant petitions for rehearing within the 25 day period currently provided (by its Rule 33), it must also have jurisdiction during the entire Term; for its authority to grant petitions for rehearing during the Term arises from the *same* source. This can, perhaps, be more clearly seen if, for instance, the Court, (having, of course, power to modify its own rules) were to change the current period of 25 days (it has been a different period at times in the past), for appl. ations, without permission, for rehearing, to the period of the entire Term. Would the Court in that event be hoisting itself (so far as jurisdiction is concerned) by its own bootstraps. We respectfully submit that the answer is obviously not—the Court has jurisdiction throughout the *entire* Term.

Remand to the Tax Court.

As was prayed for, in the Petition for Rehearing, *supra*, it is hoped that the Court will, at the very least, remand the

cause to the Tax Court for the purpose of reconsidering the imposition of the 25 per cent penalty for the year 1936, if the petitioner shall seasonably apply to the Tax Court therefor. For, as in the case of *Commissioner* v. *Lane-Wells Company* (decided on the same day as the cause at bar) the Board of Tax Appeals erroneously assumed that the mandatory provision for penalty applied to the taxable year 1936 as well as the other taxable years involved herein. We respectfully submit that, as in that cause, this Honorable Court should, if it does not care to make the determination itself, remand the present case to the Tax Court for the purpose of considering the imposition of the 25 per cent penalty for the year 1936.

Conclusion.

WHEREFORE, UPON THE FOREGOING GROUNDS, IT IS RESPECTFULLY SUBMITTED THAT THIS PETITION FOR REHEARING SHOULD BE GRANTED AT SUCH TIME AS MAY BE CONVENIENT TO BE FIXED BY THE COURT AND THAT

(a) the order herein dismissing the writ of certiorari herein be vacated;

(b) that an order be granted reinstating said writ and reopening the appeal;

(c) that that portion of the judgment herein of the United States Circuit Court of Appeals for the Second Circuit which imposes a tax penalty be reversed (or at the very least that the penalty for the taxable year 1936 be removed or the cause remanded to the Tax Court for the purpose of reconsidering the imposition of the 25 per cent penalty for the year 1936, if the petitioner shall seasonably apply to the Tax Court therefor); and

(d) for such other and further relief as the nature of the case may require and to this Honorable Court shall seem proper.

Respectfully submitted,

(Sgd.) GERALD DONOVAN,
Counsel for Petitioner.

FRANCIS F. STEVENS,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 1.—October Term, 1943.

R. Simpson & Co., Inc., Petitioner, *vs.* Commissioner of Internal Revenue. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[February 14, 1944.]

Mr. Justice Jackson delivered the opinion of the Court.

For the years 1934, 1935, and 1936 the taxpayer, a corporation, filed complete income and excess-profits tax returns on Form 1120 of the Treasury Department. Each of these included a question whether the corporation was a personal holding company within the meaning of § 351 of the applicable revenue act and stated that if it was, an additional return on Form 1120H was required. The taxpayer answered the question in the negative and did not in any year file personal holding company returns on Form 1120H.

The Commissioner assessed personal holding company surtaxes for each year and under the authority of § 406 of the Revenue Act of 1935 and § 291 of the Revenue Acts of 1934 and 1936 assessed a 25 per cent penalty for failure to file the personal holding company return.

The treasurer, who executed the income tax returns, did not file personal holding company returns because he thought the taxpayer was not a personal holding company within the meaning of the Act. It was actively engaged in the pawnshop business. However, more than 50 per cent of its capital stock was owned by less than five stockholders, and more than 80 per cent of its gross income was derived from interest. The taxpayer filed information returns showing dividends of over $300 paid to each stockholder during those years and its books and records made available to the Commissioner during audit disclosed the facts. No fraud or bad faith is suggested.

The Board of Tax Appeals affirmed the penalties,[1] and its decision was affirmed by the Circuit Court of Appeals.[2] There

[1] 44 B. T. A. 498.
[2] 138 F. 2d 742.

appearing to be no conflict of decision between circuits, we on November 9, 1942 denied certiorari.[3] The 25-day period allowed by our rule in which to file petition for rehearing expired. In February 1943 a conflict developed through decision of *Lane-Wells Co.* v. *Commissioner* by the Court of Appeals for the Ninth Circuit.[4] Petitioner asked leave to file out of time a petition for rehearing and we consented. On June 7, 1943, we granted petition for rehearing, vacated the order denying certiorari, and granted certiorari limited to the penalty question.[5] We asked counsel in view of § 1140 of the Internal Revenue Code and *Helvering* v. *Northern Coal Co.*, 293 U. S. 191, to discuss our jurisdiction to grant a petition for rehearing in the case.

Section 1140 of the Internal Revenue Code, in relevant part, provides:

"The decision of the Tax Court shall become final—

. . . . . .

(b) *Decision affirmed or petition for review dismissed.*—

. . . . . .

(2) *Petition for certiorari denied.*—Upon denial of a petition for certiorari, if the decision of the Tax Court has been affirmed or the petition for review dismissed by the Circuit Court of Appeals; or

(3) *After mandate of the Supreme Court.*—Upon the expiration of 30 days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the decision of the Board be affirmed or the petition for review dismissed."

There are other provisions dealing with the situations where the Board's decision is modified or reversed by the Circuit Court of Appeals or by this Court, the purpose being to determine definitely the date on which the statute of limitations, suspended during appeal, begins to run again and assessment may be made by the Commissioner. The Revenue Act of 1926 had identical provisions.[6] In reporting upon the provision in the Revenue Bill of 1926, the Senate committee said:

"Section 1005 prescribes the date on which a decision of the Board (whether or not review thereof is had) is to become final. Inasmuch as the statute of limitations upon assessments and suits for collection, both of which are suspended during review of the Com-

[3] 317 U. S. 677.

[4] 134 F. 2d 977.

[5] 319 U. S. 778.

[6] § 1005, 44 Stat. 110.

missioner's determination, commences to run upon the day upon which the Board's decision becomes final, it is of utmost importance that this time be specified as accurately as possible. In some instances in order to achieve this result the usual rules of law applicable in court procedure must be changed. For example, the power of the court of review to recall its mandate is made to expire 30 days from the date of issuance of the mandate." Sen. Rep. No. 52, 69th Cong., 1st Sess., p. 37.

In *Helvering* v. *Northern Coal Co.*, *supra*, we considered the provision of the 1926 Act, corresponding to § 1140(b), (3), of the Internal Revenue Code, dealing with issuance of mandate by this Court. The question was whether notwithstanding the lapse of more than thirty days after mandate we could grant a petition for rehearing, and it was urged that this statute did not qualify the inherent power of the Court to reconsider its judgments throughout the term in which they are entered. Quoting the statute, we held: "In view of the authoritative and explicit requirement of the statute and of its application to these cases, the petitions for rehearing are severally denied."

While it appears that we have a number of times granted certiorari to review decisions in cases originating with the Tax Court after once denying the petitions, *Duquesne Steel Foundry Co.* v. *Burnet*, certiorari denied, 282 U. S. 878, certiorari granted, 282 U. S. 830; *Neuberger* v. *Commissioner*, certiorari denied, 308 U. S. 623, certiorari granted, 310 U. S. 655; *Crane-Johnson Co.* v. *Commissioner*, certiorari denied, 308 U. S. 627, certiorari granted, 309 U. S. 692; *Helvering* v. *Cement Investors, Inc.*, certiorari denied, 315 U. S. 802, certiorari granted, 315 U. S. 825, in all but one of these cases the petition for rehearing was filed within 25 days after the denial of certiorari. In the other, the question of jurisdiction was not raised or considered, and therefore it does not establish a construction of the statute. *United States* v. *More*, 3 Cranch 159, 172; *Snow* v. *United States*, 118 U. S. 346, 354; *Cross* v. *Burke*, 146 U. S. 82, 86; *Louisville Trust Co.* v. *Knott*, 191 U. S. 225, 236; *Arant* v. *Lane*, 245 U. S. 166, 170.

It sometimes is desirable in the light of events to grant a previously denied writ of certiorari, as where it appears the question must later be taken because of conflict. A grant in such a case not only enables us to do justice to the party if it appears that he has the right of the controversy, but also it gives us the benefit of argument and examination of the additional or contrary aspects

of the question presented by the case. Our rules provide for petitions for rehearing as matter of right within 25 days after judgment,[7] and this rule has been applied to petitions for rehearings of orders denying certiorari. We have applied it to cases falling within the purview of Section 1140(b)(2). No mandate issues on denial of certiorari, and after a final decision the mandate does not issue until expiration of the 25-day period within which petition for rehearing may be filed.[8] If, therefore, we follow the practice heretofore observed, by which we regard denials of certiorari as qualified until the 25-day period expires, we put the denial and the decision on a generally equal basis except as Congress has seen fit to give the latter an additional thirty days before finality. The Government after consideration of the practical aspects of the question advises that in its view our practice in these matters has been "salutary and in accordance with sound policy." There appears to be no good reason, therefore, to hold that the rule as to rehearings, in so far as it permits as matter of right the filing of petition therefor within 25 days, may not apply to this class of cases. But when under our rules our denial has become final, this statute deprives us of jurisdiction over the case.

Accordingly the writ of certiorari is dismissed for want of jurisdiction.

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7 Rule 33.
8 Rule 34.

Mr. Justice DOUGLAS, with whom Mr. Justice MURPHY and Mr. Justice RUTLEDGE concur, dissenting.

I can find no warrant in § 1140 of the Internal Revenue Code for saying that the decision of the Tax Court becomes "final" only after the expiration of the 25-day period within which a petition for rehearing may be filed. The section contains no such provision. The 25-day period for rehearings is prescribed by our Rule 33. But our authority to grant petitions for rehearing during the Term rises from the same source. See *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.*, 300 U. S. 131, 136-137; *Art Metal Construction Co.* v. *United States*, 289 U. S. 706; *Bronson* v. *Schulten*, 104 U. S. 410, 415. Hence I see no basis for saying that one, but not the other, qualifies that provision of § 1140 which states that the decision of the Tax Court becomes final "upon denial of a petition for certiorari".